United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-7234

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

STANLEY V. TUCKER,

Plaintiff/Appellant

-v-

MECHANICS SAVINGS BANK, ET AL.

Defendant/Appellees

UNITED STATES COURT OF APPEALS
FILED
AUG 12 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BRS

APPELLANT'S BRIEF

Appeal from the decision of the HON M. J. BLUMENFELD, USDC District of Connecticut of December 14th, 1976 and to the knowledge of Appellant this decision is not reported

STANLEY V. TUCKER
PLAINTIFF/APPELLANT
BOX 35
Hartford, Conn 06101
232-6682

INDEX

	Page
Issues for Review	1
I. Statement of the Case.....	1
I A - Background of Federal Litigation by Appellant ...	1
I B - Nature of the Case.....	3
I C - Proceedings in Lower Court,,.....	3
ARGUMENT.....	4
I. Statute of Limitations Not A Defense.....	4
A. Statute of Limitations not a Federal Defense...	4
1. Federal law governs in federal court.....	4
2. Mortgage tying in Extra Costs violates ..... Anti Trust	5
3. Federal Courts hold continuing conspiracies to toll statute of limitations	6
4. Speculative Damages Toll Statute of Limitations	10
5. Fraudulent Concealment Tolls " " "	12
6. Statute of Limitations Runs from Termination of Installment Contract Not When Executed	13
7. Conspiracies usually concealed and federal courts accept facts allowing Inferences	14
B. Statute of Limitations no Defense Under State Law	15
II. Granting Plaintiff's Motion to Amend Complaint Mooted Defendant's Motions and Judgment of Dismissal Was Granted in Error	18
III. Trial Judge Denied Due Process to Plaintiff by Entering Judgment of Dismissal after Granting Leave to Amend the Complaint	19
IV. Pendant (state law) Causes of Action Rise or Fall with Federal Cause of Action	19
CONCLUSION	20

TABLE OF CITATIONS

Page

Federal Cases

Akron Presform Mold Co v McNeil Corp
496 F 2d 230 (1974) 11

Atlantic City Electric v G E Co
312 F 2d 236 13

Baker v F & F Investment
420 F 2d 1191 13

Brett v First Federal S & L
461 F 2d 1155 14

Fortner Enterprises v U S. Steel
394 US 495 5

Fry v Hancock Insurance
355 F Supp 1151 5

G.E. Cov :v City of :San Antonio
334 F 2d 480 13

Holmberg v Armbrecht
327 US 392 4

Kansas City v Federal Pacific
310 F 2d 271 13

Kinee v Abraham Lincoln Federal S & L
385 F Supp 975 5

Lloyd v United Liquors Corp
203 F 2d 789 18

Lupia v Stella D' Oro Biscuit Co
1974-1 Trade Cases S 75,046 7

Monona Shores v U S Steel
374 F Supp 930 11

Muller Corp Zurich v Gazocean Int SA
1975-2 Trade Caes 60,401 9

North rn Pacific RR Co v USA
79 S Ct 514 6

Pony Creek Cattle Co v Great A & P Tea Co
1975 -2 Trade Cases 60,660 12

Public Service of New Mexico v G E
315 F 2d 306 13

Schaer v Rhodes
416 US 232 2

Federal Cases (continued) — Page

Tucker v Maher
USDC Conn No 13786 — 1,2

Tucker v Maher
441 F 2d 740 — 2

Tucker v Maher
497 F 2d 1309 — 2

Tucker v Maher
405 US 1052 — 2

Twin City Sportsserv v Finely
512 F 2d 1264 — 7

U S v Campagna
146 F 2d 524 — 6

Zenith Radio v Hazeltine Research
91 S Ct 795 — 8, 10, 12

Federal Rules of Civil Procedure

Rule 15 b — 18

General Statutes of Connecticut

G.S. 52-604 to 609 — 2

State Citations

Bank of Hartford v Waterman
26 Conn 324 — 15

Maggay v Nikitko
117 Conn 206 — 16

Giambozi v Peters
127 Conn 380 — 16

Handler v Remington Arms
144 Conn 316 — 16

Skidmore, Owings & Merill v Conn General
26 Conn Supp 76 — 16

Rector Church of Holy Communion v Paterson RR Co
49 Atlantic 1030 — 15

Ricciuti v Voltarc Tubes
277 F 2d 869 — 17

Warwick v Hutchinson
45 N. J. Law 61 — 15

Welch v ZBA
158 Conn 208 — 19

Wojcuewicz v Cummings
145 Conn 11 — 19

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STANLEY V. TUCKER,
Plaintiff/Appellant

-v-

No 77-7234

MECHANICS SAVINGS BANK, ET AL
Defendant/Appellees

Issues Presented For Review

---

1. The Stature of Limitations is not a Defense to This Action
2. The First Amended Complaint, granted by the Court, fully Disposed of All Statute of Limitations Defenses
3. By Granting Summary Judgment For Defendants After Granting Motion to Amend Complaint Trial Judge Denied Due Process to Appellant
4. Plaintiff's Second and Third Causes of Action have pendant jurisdiction

---

I. Statement of the Case

I A - Background of Federal Litigation by Appellant

This Appellant is no stranger to due process and equal protection litigation in the federal courts. In 1970 vexed by a number of pre-judgment attachments levied on his properties in Connecticut, some of which arose out of a fire in a building under construction, this Appellant filed his first action in the USDC-Connecticut, namely Tucker v Maher, USDC -Conn No 13,786, quickly followed by two other actions with the same constitutional challenge to the attachment laws of

Connecticut. The same Judge Blumenfeld dismissed all three actions and Tucker v Maher was taken on appeal and the dismissal upheld by the 2nd C. A., 441 F 2d 740, but the UNITED STATES SUPREME COURT reversed and remanded, 405 US 1052.

On remand hearing was had before a three-Judge District Court and three days after hearing but before decision was rendered former Governor Meskill signed into law Public Act 73-431, Pre-Judgment Remedy Act, thus upholding this Appellant's constitutional claims but mooting his federal action. The Three-Judge Court then dismissed the damage claim on a ""good faith" defense. On appeal the 2nd C. A. upheld the dismissal 497 F 2d 1309, with an enlightened opinion that documented the varied conflict between the Circuit Courts of Appeal as to validity of a "good faith" defense. The Supreme Court denied Certiorari however in another action with the same issues involving the Kent State Student murders, Schaer v Rhodes 416 US 232, rejected the good faith defense to the extent that a trial on the merits was required where the complaint alleged the actions were wanton and wilful.

This Appellant in a series of litigations in the USDC-Conn. challenged on constitutional grounds the "registration" of out of state liens without notice and/ or hearing again the challenge was dismissed in the District Court, dismissal upheld by the 2nd C. A. but the need for filing a Petition for Certiorari was mooted by action of the Connecticut Legislature adopting the Uniform Recognition of Foreign Judgments Act, GS 52-604 through 609.

Thus this Appellant appears before this Court once again as a litigant whose every action was dismissed

and denied in the District Court but whose challenges have been vindicated on appeal by action or orders of the UNITED STATES SUPREME COURT and / or by the CONNECTICUT STATE LEGISLATURE.

I B- Nature of the Case

In this action Plaintiff is suing a first mortgagee and the attorneys who worked for the first mortgagee in drafting and handling the issuance of the first mortgage on grounds that the legal services rendered and billed violated the Sherman Anti-Trust Act being Bar Association "minimum" fee schedules and in addition by use of the illegal "tie in" of attorney services Appellant was forced to pay double and triple for legal work already done and paid for. In addition in consideration for the monopoly on the mortgage work the attorneys "interpreted" the terms contrary to the General Statutes of Connecticut, admittedly without any case law support, to deny to Plaintiff/Appellant $12,800. of the mortgage money releases so Defendant could use the money on other projects. This interpretation was fraudulently concealed from Plaintiff for many years until after this law suit started and Plaintiff was given a fictitious reason for denial of the $12,800 release. In addition Plaintiff contends that he suffered continuing damages years later that at the time of the initial torts was unknown and speculative.

I-C Proceedings in Lower Court

Answers were filed of a general denial and many motions were ruled on as to discovery and both sides filed motions for Summary Judgementand the Defendants further filed a Motion to Dismiss based on Statute of Limitations.

On May 10th, 1976 Plaintiff filed a Motion for Leave to File an Amended Complaint to provide specific allegations showing fraudulent concealment of the cause of action and detailed allegations as to continuing damages.

The motion to amend was granted on Nov 18, 1976 and on Dec 10th, 1976 Plaintiff filed his First Amended Complaint containing the allegations of fraudlent concealment and also adding a third cause of action for breach of contract.

Overlooking the motion to amend and the First Amended Complaint the District Court on November 23, 1976 granted the Defendant's Motion for Summary Judgement on the defense of statute of limitation and on December 14, 1976 entered Judgment accordingly.

ARGUMENT

I. STATUTE OF LIMITATIONS IS NOT A DEFENSE TO THIS ACTION

This court is asked to view the entire record and especially the First Amended Complaint, apparently overlooked or carelessly read by the District Court.

A. STATUTE OF LIMITATIONS IS NOT A DEFENSE UNDER FEDERAL LAW

1. Federal law on limitations is governing in federal court.

Holmberg v Armbrecht 327 US 392 1946

"Decision of a suit in a federal court to enforce a federally created equitable right is not controlled by the statute of limitations of the state of the forum"

2. Mortgage Tying of Extra Costs Violates Anti-Trust Laws

Kinee v Abraham Lincoln Federal S & L , 385 F Supp 975 1973

Page 975:

5. Monopolies ⇐28(6.4)

Construing antitrust complaint broadly, conspiracy theory advanced therein stated a claim upon which relief might be granted as to allegations that defendant writers of mortgages, in relation to requirement that borrowers, as part of their mortgage agreements prepay in monthly installments, without receiving any interest on their money, a sum equal to one-twelfth the annual expected property tax, mortgage insurance premiums, sewer and water rentals and other possible liabilities, caused the disappearance of or a substantial reduction in the availability of the principal debt balance method of accounting for tax, assessment, and insurance payments from a market which was formerly characterized by substantial competition. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

In Fortner Enterprises Inv v U. S. Steel 394 US 495 1969 a tie in sales of credit was held to be a per se violation of the anti-trust laws with economic power inferred from seller's ability to impose burdensome terms such as a tie-in. Another action involving loans where the court upheld anti-trust jurisdiction over tie in sales of life insurance policies and irrigations systems was

355 F Supp 1151 1973 at P 1152:

Fry v Hancock Insurance Co

Court, Woodward, J., held that in class action against insurer alleging violation of, inter alia, the Sherman Act, allegations that insurer engaged in an unlawful conspiracy in unreasonable restraint of interstate farm loans by employing tie-in arrangements requiring members of the class to purchase irrigation systems and/or life insurance policies from insurer as a condition of obtaining farm loans from insurer, activities complained of were not part of the "business of insurance" which Congress sought to remove from federal regulation by means of the McCarran-Ferguson Insurance Regulation Act.

Motion denied.

In Northern Pacific RR Co v USA 79 S Ct 514 1958 it was held that deeds and leases were illegal and injunctive relief granted on anti-trust grounds where they required as a tie in clauses that goods be shipped via the railroad. Mr Justice Black, held that unless rates were more favorable the "preferential routing" clauses were per se unlawful restraints of trade in violation of Sherman Act. In this action Defendants cannot contend that their use of "preferential attorneys services" were based on "more favorable rates" as under the verified allegations of the complaint Plaintiff had to pay double and triple for title search.

3. Federal Courts Have Held Continuing Conspiracies to Toll the Statute of Limitations and All Conspirators Are Liable if Any Conspirator Commits an Overt Act in Furtherance of the Conspiracy.

The classic case the develops the theory of liability of all conspirators in a continuing consiracy is U. S. v Compagna 146 F 2d 524 2nd C. A. Cert Denied 65 S Ct 912.

> "A defendant once shown to have been a member of a conspiracy which lasts until beginning of limitations period must satisfy jury by affirmative proof that he disconnected himself from conspiracy before that period began to assert defense of statute of limitations"

In this action the undisputed allegations show that $12,800 was denied to Plaintiff repeatedly last in Sept 1975 based on an "opinion" rendered by Thomas A. Bailey and that as of this date none of the defendants

have taken any affirmative action to repudiate and to disconnect themselves from the illegal conspiracy. The 9th CA in 1975 in Twin City Sportserv v Finley 512 Fd2nd 1264 well expressed the "continuing harm" theory"

P1270:

A civil cause of action under the Sherman Act arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time. Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd., 185 F.2d 196, 208 (9th Cir. 1950), cert. denied 340 U.S. 943, 71 S.Ct. 506, 95 L.Ed. 680 (1951). Sportservice argues that Finley's suit is barred because it was not filed within four years of the last allegedly damaging act, the amendment or extension of the contract to its complete 33-year duration in 1954. This argument overlooks the necessarily continuing nature of the alleged harm. As the Supreme Court stated in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 502 n. 15, 88 S.Ct. 2224, 2236, 20 L.Ed.2d 1231 (1968),

"We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. [Citation omitted.] Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm . . ."

Thus the fact that the final amendment to the contract was made in 1954 does not preclude Finley from bringing suit in 1968. To hold otherwise is to say that some damage that might have been sustained was barred before it accrued.

Another action where the USDC - ND Illinois rejected a statute of limitations defense on agreements last amended in 1961 and 1962 where continuing damages were alleged through March 1972 bis Lupia v Stella D'Oro Biscuit Co 1974-1 Trade Cases S 75,046, appeal dismissed (7th CA) cert denied 417 U. S. 930 (1974) at Page 96,686:

III. *Statute of Limitations*

The complaint in this case was filed on March 22, 1972. 15 U. S. C. § 15(b) provides that an action is "forever barred unless commenced within four years after the cause of action accrued." Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. *Zenith Radio Corp. v. Hazeltine Research* [1971 TRADE CASES ¶ 73,484], 401 U. S. 321, 338 (1971). Where a continuous course of unlawful conduct or a continuing conspiracy is alleged, a cause of action accrues when "a plaintiff feels the adverse impact" of each invasion of his rights. *Id.* at 339. The injurious impact of each new overt act in the course of illegal conduct creates a new cause of action for which damages may be recovered. *Weber v. Consumers Digest, Inc.* [1971 TRADE CASES ¶ 73,514], 440 F. 2d 729, 731 (7th Cir. 1971).

There are, accordingly, allegations of a course of conduct beginning with and either premised upon or related in some way to the 1961 and 1963 agreements, but continuing through the years until 1971. It is to be noted that one alleged violation, allowing plaintiff to handle products manufactured by other manufacturers if plaintiff bought them through defendant, is inconsistent with the terms of the agreements and cannot be said to depend upon them. To the extent that plaintiff can prove overt acts which caused him injury in the period between March 22, 1968 and March 22, 1972, he would be entitled to damages for that injury.

The above recent decisions naturally follow from the decision of the UNITED STATES SUPREME COURT in Zenith Radio v Hazeltine Research 91 S Ct 795 (1971)

Zenith, supra, affirmed that under anti-trust laws suit is not limited to damages known at time of first injury but under continuing conspiracy includes future damages even going beyond trial see P 796:

11. Monopolies ⇐23(9)

In case of continuing conspiracy to violate antitrust laws, each separate cause of action that accrues each time plaintiff is injured by act of defendant entitles plaintiff to recover not only those damages which he has suffered at date of accrual but also those which he will suffer in the future from particular invasion, including those he has suffered during and will predictably suffer after trial. Clayton Act, § 5(b) as amended 15 U.S.C.A. § 16(b).

In detailed opinion Zenith, supra, developed that speculative damages beyond four year period are not barred. P 798

3. A plaintiff in an antitrust action may recover damages occurring within the statutory limitation period that are the result of conduct occurring prior to that period if, at the time of the conduct, those damages were speculative, uncertain, or otherwise incapable of proof. Pp. 806–808.

The argument developed in Zenith, supra, stands to reject a statute of limitations defense herein as the damages were speculative in 1970 and not known with precision until 1974 and 1975

Recent decisions of the federal courts have expanded the "continuing conspiracy" theory to include time periods during which no overt acts were alleged but inferences existed to show the continued existance of the conspiracy.

Muller Corp Zurich v Gazocean International S.A. USDC SD NY May 27, 1975. 1975-2 Trade Cases 60,401 :

> It is thus apparent that plaintiff can only recover damages in this action for acts which occurred within four years of the filing of the second complaint. The defendants argue that since plaintiff has not alleged one *specific* overt act during this critical period, the complaint must be dismissed.
>
> We are constrained to disagree. It is now beyond cavil that the liberal rules of notice pleading under Rule 8 of the Federal Rules of Civil Procedure are as applicable to complicated antitrust suits as they are to simple claims of negligence. See, Moore's *Federal Practice*, Vol. 2A, § 8.17[3], pp. 1743 *et seq.* Plaintiff has alleged in the Second Complaint that the claimed antitrust conspiracy extended into 1971 and beyond. Although no specific overt acts were alleged for this period, plaintiff has indeed set forth many overt acts occurring in 1968, 1969 and 1970, from which a continuing conspiracy as well as the continuing performance of overt acts can certainly be inferred, particularly as to those defendants who do not have the benefit of an adjudication that no conspiracy existed prior to June 24, 1974. See, e. g. *Brett v. First Federal Savings & Loan Association* [1972 TRADE CASES ¶ 73,982], (5th Cir. 1972) 461 F. 2d 1155.

In this action Plaintiff has alleged overt acts pursuant to the conspiracy to deny the $12,800 last act in Sept 1975 however, under the Muller Corp, supra, opinion overt acts are not required to be alleged but can be inferred.

4. Speculative Damages at the Time of the First Overt Act Toll The Statute of Limitations.

The allegations of the verified complaint and more clearly the proposed Amendment to Complaint show that as of June 1970 Plaintiff could not realistically foresee the damages he would be subjected to in later years and especially in 1974 and 1975. A trial on damages alone(if summary judgment were granted on Plaintiff motion on liability alone) would afford defendants ample time to contest specific damages claims with testimony and witnesses. Plaintiff is entitled to a trial on grounds of speculative nature of damages and the motions for summary judgment by defendants based on statute of limitations are without merit . Zenith Radio v Hazeltine Research 91 S Ct 795 clearly propounded for the first time the theory of speculative damages tolling the statute of limitations.

Zenith P 797:

14. Monopolies ⇨28(4)

In view of record disclosing that if counterclaimant had brought a treble damage action for damages suffered as a result of conspirator's activities more than four years before statutory period for which present suit was being brought and had attempted to prove future damages it would not have been allowed to recover those future damages, counterclaimant was entitled to recover damages in present action even though a portion of damages was the proximate result of conduct occurring more than four years prior to filing of counterclaim. Clayton Act, § 5(b) as amended 15 U.S.C.A. § 16(b).

The above case was further expanded to hold that the "speculative" nature of the damages - not the speculative nature of the existance of a cause of action is what tolls the stature of limitations.

Akron Presform Mold Co v McNeil Corp 496 F 2d 230 (1974) at P 233:

[1-3] This statute of limitations commences to run from the commission of the last overt act causing injury or damage. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971); Garelick v. Goerlich's Inc., 323 F.2d 854, 855 (6th Cir. 1963). Generally, there are two means by which one can avoid the operation of the statute of limitations. One, the rule enunciated in *Zenith Radio Corp., supra*, 401 U.S. at 338–342, 91 S.Ct. 795 provides that a plaintiff may recover damages occurring within the period of the statute of limitations that are the result of conduct occurring prior to that period, if at the time of the conduct, those damages were speculative, uncertain or otherwise incapable of proof. Second, in cases in which the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed. 2d 770 (1959), or because of fraudulent concealment, Holmberg v. Armbrecht, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946), the Supreme Court has held the statutory period to have been suspended or tolled by the conduct of the defendant.[3]

In applying the Supreme Court Zenith, supra, holding as to anti-trust claims arising from a foreclosure the statute began to run from the commencement of the foreclosure as at that time the damages were sufficiently appraisable for the issue to go to the jury.

Monona Shores v U. S. Steel 374 F Supp 930 D Minn 1974

The attention of this court is invited to Para 17 of the verified complaint..."Plaintiff has continually suffered damages from June 1970...continued into the future..."

The attention of this court is invited to Answers to Interrogatories dated March 23, 1976 Int No 26 Item 5 Appendix R 15 which develops damages due to foreclosure that started in 1975 (see first amended complaint Para 23 d) Appendix B 9.

5. Fraudulent Concealment of a Cause of Actions Tolls The Statute of Limitations.

The Zenith, supra, holding developed the fraudulent concealment theory that has been consistently followed by many courts.

Pony Creek Cattle Co v Great A & P Tea Co 1975-2 Trade Cases 60,660:

> As a general rule, summary judgment should be invoked sparingly in antitrust litigation; however, statute of limitations situations are appropriate for summary judgment even in advance of discovery. *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F. 2d 289 (8th Cir. 1975). To toll the statute of limitations in an antitrust action on grounds of fraudulent concealment, plaintiffs must establish (1) concealment by defendants of plaintiffs' cause of action, (2) lack of knowledge by plaintiffs of the existence of their cause of action, and (3) a reasonable probability that due diligence by the plaintiffs would not lead them to discover their cause of action within the four-year statutory period. *Willmar Poultry, supra.*

In this action the defendants by their affidavits show that the $12,800 was witheld pursuant to an "opinion" by Defendant Thomas A. Bailey in June 1970 and affirmed in the fall of 1970. Yet as of this date the plaintiff has yet to see this "opinion". The allegations of record (Answer 23 page 8 of Answers to Interrogatories dtd March 23, 1976) shows Plaintiff was given as a reason for refusal of the $12,800:"The Mechanics Savings Bank is tied in on the New Haven computer and the computer shuts down at 3 pm" The affidavits recently executed by George G. Johnson and Thomas A. Bailey show how ever that it as an "opinion" secretly issued by Bailey to Mechanics in June 1970 that was the reason for denial of the funds.

These facts are enough to establish fraudulent concealment when read in light of Plaintiff's persistent efforts to bring about the release of the $12,800 running to the last demand in Sept 1975 (see Answers to Interrogatories dtd March 23, 1976). Some of the many cases in which fraudulent concealment tolled the limitations statute are:

G. E. Cov v City of San Antonio 334 F 2d 480 1964

Kansas City v Federal Pacific Electric Co 310 F 2d 271 1962

Atlantic City Electric v G. E. Co 312 F 2d 236 1962

on appeal from 207 F Supp 613 S.D. NY affirmed by 2nd C. A.

Public Service of New Mexico v G.E. Co et al 315 F 2d 306 1963

6. Federal Courts have Held Statute of Limitations Runs From Date Termination of Installment Contract Not When Executed.

The defendants argue on a mortgage contract with fixed monthly instalmment payments that run until June 1995 that a limitations period should be computed from June 1970 because that is when they illegally witheld $12,800. Such an argument is self-serving and conclusionary and without any foundation in case law. Baker v F & F Investment 420 F 2d 1191 1970 affirms the opposite - that the statute runs from when final payment terminating the installment contract is made.

Baker at P 1191:

> **Class actions seeking relief for alleged sales of used residential property to Negroes at higher prices and under more burdensome terms than would have been charged white purchasers. The United States District Court for the Northern District of Illinois, Hubert L. Will, J., 300 F.Supp. 210, held that plaintiffs stated claim on which relief could be granted under Civil Rights Act but that statute of limitations ran from date installment contracts terminated rather than date they were executed. Defendants took interlocutory appeals and plaintiffs were given leave to cross appeal. The Court of Appeals, Cummings, Circuit Judge, held that doctrine of laches was not applicable, that five-year statute of limitations for civil state actions not otherwise provided for governed claim under Civil Rights Act and that period of limitations commenced when contracts terminated.**
>
> **Affirmed.**

7. Conspiracies Are Usually Concealed and Difficult To Allege Precise Facts and Federal Courts Accept Facts From Which Inferences Can Be Drawn.

Brett v First Federal S & L 461 F 2d 1155 1972

: 1158:

> [6-8] Although plaintiffs may be unable to allege specific facts proving actual acts of agreement or conspiracy, the pleadings are sufficient if they set forth facts from which an inference of unlawful agreement can be drawn. Actual agreements are seldom capable of proof by direct testimony and thus circumstantial evidence may be allowed to establish an alleged conspiracy. Interstate Circuit v. United States, 306 U.S. 208, 221, 59 S.Ct. 467, 83 L.Ed. 610 (1939); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612, 34 S.Ct. 951, 58 L.Ed. 1490 (1914); Wall Products Co. v. National Gypsum Co., 326 F.Supp. 295, 316 (N.D., Cal., 1971). Plaintiffs cannot be required to plead with specificity the very facts which can only be proven by circumstantial evidence.

In this action inferences of an unlawful agreement can easilly be drawn from the Committment Letter, Ex A to the complaint, barren of the illegal tie in and of the minimum fees imposed by the great economic power of the Mechanics Savings Bank on Plaintiff after he accepted the commitment The "opinion" secretly concealed from Plaintiff in June 1970 and even to this very date is unmentioned in the commitment letter. The Affidavits of Johnson and Wignal, senior executives with Mechanics Savings Bank show that they imposed on Plaintiff the necessity for the tied in product and gave to Plaintiff no escape from the monoplistic and anti-competitive methods they chose to use.

B. STATUTE OF LIMITATIONS IS NOT A DEFENSE UNDER STATE LAW

Within Connecticut case law has from early times held that a "tort is complete" when the injury is sustained that results from the tortious action for purposes of the statute of limitations. Thus clearly following federal case law.

Bank of Hartford v Waterman 26 Conn 324 1853

P 324: "when the act is not legally injurious until certain consequences occurr the period takes date from the consequential injury"

This theory is consistent with old English law and with cases from all states going back to colonial times.

Perhaps the clearest of early cases in its summary of legal principles prohibiting the defense of statute of limitations is Rector etc Church of Holy Communion v Paterson Extention R Co 49 Atlantic 1030 N.J. 1901. In this action damages to a retainer wall were paid for and released and as many years went by vibrations from the passing trains caused more damages. It was held neither the release nor the statute of limitations barred the damages and indeed a new settlement or judgment would not bar suit for continuing future damages if such occured.

> "It is a fundamental principle of law applicable alike to breaches of contract and to torts, that in order to found a right of action, there must be a wrongful act done, and a loss resulting from that wrongful act" Warwick v Hutchinson 45 N. J. Law 61

The theory that damages (and time for computing of the statute of limitations) runs from completion of a contract (in this case the contract is the mortgage contract terminating in June 1995) was well expressed in :

Skidmore, Ownings & Merill v Conn General 26 Conn Supp 76

> "the allged breach of contract by the plaintiff was a continuing one until 1957, the date of completion of the building."

In Skidmore, supra, Defendant Architects, contended in a negligence action that they were protected and the statute of limitations was computed based on when the plans were approved and work started. But the Court held that the statute ran from completion of the building.

The following cases in Connecticut all consistently hold that the statute is computed from the end of the acts causing injury.

1. Maggay v Nikitko 117 Conn 206 (1933)

   This case held continuing loss of affections by acts of adultery meant a partial loss of affection and the statute applied from the end of the acts.

2. Giambozi v Peters 127 Conn 380 (1940)

   This case held that injury due to continuing medical treatment were subject to statute of limitations from the completion of the treatment.

3. Handler v Remington Arms 144 Conn 316 (1957)

   This case held damages due to defective cartridge due to continuing negligent exposure the statute of limitations was not applicable.

4. Ricciuti v Voltarc Tubes 277 F ed 869 (1960)

A lower federal court coming before Handler, supra, was reversed by the Second Circuit Court of Appeals to be consistent with Handler.

5. Rogers v White Metal Rolling and Stamping Corp 249 F 2d 262 (1957)

The Second Circuit Court of Appeals reversed a lower federal court to make the decision consistent with Handler, supra, and to hold the statute of limitations did not bar an injury due to a defective ladder due to continuous exposure to its defective condition.

ALL STATE AND FEDERAL CASES SINCE HANDLER HAVE FOLLOWED THE "CONTINUING INJURY" RULE IN REJECTING THE STATUTE OF LIMITATIONS AS A DEFENSE.

6. Calve Brothers v Mass Bonding & Insurance Co 22 Conn Supp 44 (1959)

Injuries due to dynamite left in rock from 1951 to 1956 was held not subject to a statute of limitations defense.

Can there be any practical difference between injuries caused by dynamite concealed in rock from 1951 to 1956 and injuries caused by a legal opinion concealed pursuant to an anti-trust conspiracy from 1970 to 1976?

ARGUMENT

II. GRANTING OF PLAINTIFF'S MOTION TO AMEND THE COMPLAINT MOOTED THE DEFENDANT'S MOTIONS AND THE JUDGMENT OF DISMISSAL WAS GRANTED IN ERROR.

Chronology: The following chronology is important. The Plaintiff's Motion to Amend the Complaint to allege "fraudulent concealment" and "continuing damages" was dated May 10th, 1976 and granted Nov 18th, 1976 and the First Amended Complaint was filed Dec 10th, 1976. This legal sequence clearly "mooted" the Defendants Motion to Dismiss and Motion for Summary Judgment both based on the Statute of Limitations. On page 3 of the "Ruling on Pending Motions", Appendix the Court makes clear the judgment of dismissal is because.....

"the plaintiff awaited too long...."

But the Ruling dated Nov 23, 1976 and the Judgment dated Dec. 14, 1976 came AFTER granting the Motion to Amend on Nov 18, 1976.

By granting the motion to amend the District Court effectively "mooted" the trrust of the pending motions and case law is clear that a Court will not or should not rule on matters that are moot but only on "live" controversies.

RULE 15 b FRCP - "A party may amend.... after a responsive pleading only by leave of court"

Lloyd v United Liquors Corp 203 F 2d 789 CA 6th 1953

> "Amendments to pleadings are to be allowed with liberality. Plaintiff in an anti-trust action should have been granted leave to amend his complaint at the hearing on motions to dismiss or for summary judgment, in order to avoid entry of dismissal or summary judgment."

In this action the District Court on November 18th, 1976 granted Plaintiff his anti-trust rights under Rule 15 b to amend to avoid dismisal and thereafter took away such rights by a judgment of dismissal. This action should be reversed and remanded for further proceedings consistent with the laws.

ARGUMENT

III. TRIAL JUDGE DENIED DUE PROCESS TO PLAINTIFF BY ENTERING A JURGMENT OF DISMISSAL AFTER GRANTING LEAVE TO AMEND THE COMPLAINT TO CURE ALLEGED DEFICIENCIES

The Connecticut Supreme Court has defined the ele.ments of a fair trial or a fair hearing.

Wojcuewicz v Cummings 145 Conn 11

" A fair trial (hearing) is one conducted in all material things in substantial conformity to law."

It is obvious that the proceedings did not conform to the law in that on granting the right to amend the former mtotions were rendered moot and the parties were to plead over agains exactly as if a brand new complaint had been filed for the first time.

The facts show Plaintiff was denied due process. The Connecticut Supreme Court has defined due process as to a hearing.

Welch v ZBA 158 Conn 208

P 212 "Due process does not guarantee any particular form of procedure. Katz v Brandon 156 Conn 521. Graham v Houlihan 147 Conn 321.

"The general rule at hearing is... no one may be deprived of the right.... to be fairly appriased of the facts upon which the board is asked to act."

ARGUMENT

IV. THERE IS NO DISAGREEMENT THAT THE SECOND AND THIRD CAUSES OF ACTION ARE STATE LAW ORIGINATED AND STAND OR FALL DEPENDING ON THE FIRST (FEDERAL) CAUSE OF ACTION.

The plaintiff/appellant does not quarrel with the Trial Judge's description of Pendant Juriddiction over state law causes of action as set forth in "Ruling on Pending Motions" Appendix . The concept developed and the cases relied on are that if a federal cause exists and then inter-related

causes of action arising from state law should be heard at on trial to conserve the time of the parties and make most effective the use of the Federal Courts. Under this concept reversing the lower court as to the first cause of action being a federal one then automatically the second and third causes of action are restored.

CONCLUSION

The Plaintiff/Appellant requests as relief that the District Court be reversed as to the dismissal of the anti-trust cause of action as the First Amended Complaint adequately disposed of all issues as to statute of limitations. On restoring the federal cause of action this court is asked to reverse as to the state law causes of action under pendant jurisdiction and to remand with all three causes of action to be proceeded with consistent with the laws of the United States and of the State of Connecticut where applicable.

RESPECTFULLY SUBMITTED:

STANLEY V. TUCKER
PLAINTIFF/ APPELLANT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STANLEY V. TUCKER,

Plaintiff/Appellant

-v-

No 77-7234

MECHANICS SAVINGS BANK, ET AL

Defendant/Appellees

CERTIFICATE OF MAILING

I, STANLEY V. TUCKER, hereby certify that I served by mail by depositing in the U. S. mails at Hartford, Conn. two copies of Appellant's Brief and one copy of Joint Appendix, postage prepaid and addressed:

Thomas F. Parker
799 Main Street
Hartford, Conn

Jon S. Berk
39 Lafayette Street
Hartford, Conn.

Stanley V Tucker

STANLEY V. TUCKER